Supreme Court, U.S.
FILED
MAR 18 1999
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No. 98-1252

In The

Supreme Court of the United States

OCTOBER TERM, 1998

OLGA ORISEK,

Petitioner,

v.

AMERICAN INSTITUTE OF AERONAUTICS AND ASTRONAUTICS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

OLGA ORISEK, *pro se*
The Tudor
Old Orchard Street
White Plains, New York 10604
914-686-9868

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INTRODUCTION

Respondent, in the Introduction to its Brief in Opposition, erroneously re-states and minimizes Petitioner's case by saying: "Petitioner, Olga Orisek, seeks review of the decisions of the courts below after the courts below rejected Petitioner's claim of age, gender and national origin discrimination when Petitioner was terminated along with 59 of the non-profit Respondent's 79 employees as a result of loss of its entire funding grant from NASA due to federal budget cutbacks." This merely demonstrates, as further detailed below, the familiar pattern of half-truths and deliberate misrepresentations that has permeated Respondent's handling of this case since its inception in 1993.

In the same vein, Respondent's Introduction insists that "Petitioner does not contend that there is any conflict among the circuits with respect to any issue in the Petition....". This demonstrates the kind of Respondent's faulty legal analysis which the district court previously thought it necessary to use verbatim in its decision. This is because this matter is worse than the one alluded to by Respondent: There is a repeated conflict *within* the Second Circuit between the decision made by the Second Circuit in Petitioner's case and in the case of *Hollander v. American Cyanamid Co.*, 895 F.2d 80 (2nd Cir. 1990). *See* Petition at 9 and 18.

Similarly, Respondent's Introduction refers to "the alleged circumstantial evidence claimed by Petitioner to support her case, ... as unsupported by the factual record." First, the doctrine and proof pattern established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) specifically envisions circumstantial evidence. Second, Petitioner submitted a body of circumstantial evidence that

cumulatively undercuts the credibility of Respondent's proffered reasons for its employment action. Thus, Petitioner showed that Respondent's proffered reasons are not worthy of credence and, therefore, are a sham to hide the true, impermissible, discriminatory reasons for Respondent's employment action. The more glaring examples, well supported by the factual record contrary to Respondent's statement above, are the uncontested evidence of fraudulent job description used by Respondent to bolster its claims (*See* Petition at 14) and the use, as evidence, a 15-year old Petitioner's resume in an attempt to fraudulently minimize Petitioner's qualifications and experience (*See* Petition at 12).

Among other things, Petitioner also showed that, in spite of budget cuts, Respondent's need for somebody of Petitioner's qualifications continued after Petitioner's discharge and that Respondent made attempts to replace petitioner with persons of similar qualifications but from a class of employees not protected under TITLE VII and ADEA (*See* Petition at 16); that one month before Petitioner's discharge, Respondent wrote in Petitioner's job performance review "[her] role is critical for TID's future" ....."Olga, as our Systems Guru" ..... "this is a critical position within TID" (See Petition at 16); and that, when Respondent refused to hire Petitioner for the position of Library Manager, Respondent hired a 33 year old American male, an applicant from a class of employees not protected under TITLE VII and ADEA, that Petitioner was better qualified than the chosen applicant and that Respondent purposely "relaxed" the posted requirements of the position in order to hire the less qualified applicant (*See* Petition at 10); that Respondent gave Petitioner no performance reviews for almost two years prior to Petitioner's discharge and that by not reviewing Petitioner's performance nor giving her performance warnings, Respondent demonstrably denied Petitioner the opportunity to improve (assuming that such improvement was

necessary), the opportunity that was given to all other employees either through annual job performance reviews or through performance warnings (*See* Petition at 14); that Petitioner, during the last two years before Petitioner's discharge, had significant work accomplishments resulting in substantial documented savings to Respondent's organization (*See* Petition at 15).

RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Respondent's listing of employees who were individually retained or laid off is immaterial. Petitioner presented a mathematical statistics analysis of Respondent's employment practices. The analysis shows that after 1991, Respondent systematically discriminated against foreign-born, older employees and particularly against women in what cannot be described in any way other than "American male youth movement". The analysis was prepared according to standards set in *Castaneda v. Partida*, 430 U.S. 482 (1977), *Hazelwood School District v. United States*, 433 U.S. 299 (1977) and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). *See* Petition at 5, 16 and 17.

Respondent states that the Equal Employment Opportunity Commission rejected Petitioner's claims on their merits. It is not so: The Commission specifically stated that it made no determination of culpability and issued the Notice of the Right to Sue in September 1995. *See* Petition at 2.

Respondent's claim that "the Institute's shift in 1991 from a traditional management hierarchy to a lateral 'team' organization, which she contends, led inexorably to her 1993 departure" is erroneous. Petitioner never made such contention.

Respondent again repeats its contention, previously refuted by Petitioner, that one reason for Petitioner's allegedly unsatisfactory performance was Petitioner's reliance on an outside contractor - computer programmer. This Respondent's contention is not worthy of credence for a simple reason - the evidence shows that Respondent started this practice in 1982, long before Petitioner's appointment to the position of Operations Computer Support Analyst, and has continued this practice for several years after Petitioner's discharge. *See* Petition at 15.

The decision by the courts below, restated by Respondent, is specifically the subject of this petition and it is therefore not a refutation of this Petition.

Respondent states that "The district court also discussed at length the reasons for Institute's 1991 decision to select another applicant to manage its library, finding that Petitioner's speculation as to why she was not chosen for the position did not support her claim that the Institute's program of downsizing and restructuring was a pretext for discriminatory behavior." This Respondent's statement is nonsensical and should be disregarded in its entirety. First, Petitioner has never made such claim with respect to Respondent's refusal to hire Petitioner for the position of Library Manager. This is because the Respondent's refusal to hire Petitioner for the position of Library Manager in 1991 and the inception of downsizing in 1993 were almost two years apart. *See* Petition at 10 and 11. Second, the district court has never made such finding.

RESPONDENT'S REASONS THE WRIT SHOULD BE DENIED

Respondent's reasons are disingenuous, erroneous and

have no basis in the law.

The legal issues raised in the petition, the existence of which is denied by Respondent, are as follows:

The district court abused its discretion when it denied Petitioner's request seeking information about circumstances under which certain employees protected under TITLE VII and ADEA statutes left Respondent's employ (*See* Petition at 3 and 18). The Second Circuit's affirmation is in conflict with its earlier similar decision in *Hollander* (*See* Petition at 18). There is an obvious fallacy in the Respondent's claim that no conflict among the circuits is even alleged: There is a conflict *within* the Second Circuit.

The district court went awry in interpreting the *prima facie* case and the shifting of evidentiary burden under the *McDonnell Douglas* doctrine and proof pattern as clarified in *Burdine*. *See* Petition at 3 and 7-10, Appendix at 40a-48a. The Second Circuit's affirmation is in conflict with its earlier similar decision in *Hollander*. *See* Petition at 9-10, Appendix at 40a-48a.

The district court erroneously failed to apply the *McDonnell Douglas* test prescribed for TITLE VII and ADEA cases, to the matter of Respondent's refusal to hire Petitioner for the position of Library Manager in May 1991. *See* Petition at 3 and 12.

In the matter of Petitioner's discharge by respondent in March 1993, the district court's refusal to rule on the sufficiency of Petitioner's *prima facie* case notwithstanding, Petitioner submitted overwhelming circumstantial evidence that sufficiently establishes Petitioner's *prima facie* case; just on these grounds, the district court's decision to grant the

summary judgment for Respondent is erroneous and should have been reversed as a matter of law. *See* Petition at 3 and 7-10, Appendix at 40a-48a. The Second Circuit's affirmation is in conflict with its earlier similar decision in *Hollander*. *See* Petition at 9-10, Appendix at 40a-48a.

Petitioner offered overwhelming circumstantial evidence, as envisioned by the *McDonnell Douglas* doctrine and proof pattern, showing that Respondent's proffered non-discriminatory reasons for its employment action are unworthy of credence and were therefore a sham to hide the true, impermissible, discriminatory reasons. *See* Petition at 4-19. Respondent appears to be erroneously denigrating the worth of circumstantial evidence in general and, in respondent's case, its support by factual record. On the first issue, Respondent is wrong in that the *McDonnell Douglas* doctrine and proof pattern provides an orderly method for proving discrimination in TITLE VII and ADEA cases solely on the basis of circumstantial evidence - an approach taken by Petitioner - as it is a well established fact that these cases must be frequently tried solely on the basis of circumstantial evidence. *See* Appendix at 40a-48a.

On the second issue, given the fact that Petitioner undertook to show that Respondent's proffered non-discriminatory reasons are not worthy of credence, it is disingenuous for Respondent to claim lack of factual record when Petitioner furnished uncontested evidence showing that Respondent engaged in actions such as, for instance, submitting into evidence a fraudulent job description, aimed at bolstering Respondent's claims, that, by Respondent's own admission, was previously fraudulently used in evaluating Petitioner's job performance.

CONCLUSION

For these reasons, the Petition for the Writ of Certiorari should be granted.

Date: March 17, 1999

Respectfully submitted,

Olga Orisek, Petitioner Pro Se
The Tudor
Old Orchard Street
White Plains, New York 10604
Tel./fax 914-686-9868